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IN THE

Supreme Court of the United States of America

OCTOBER TERM, 1980

Case No:_____

JAMES K. McGOVERN, J. MICHAEL McGOVERN and AUGUSTUS BRIAN FONTAINE,
Petitioners,
vs.
UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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The Question presented by this case is as follows:

Whether the Fourth Amendment permits United States Coast Guard officers-in-the-field to stop, enter and board a moving private pleasure vessel on the high seas without reasonable and articulable suspicion of non-compliance with safety and documentation regulations, and without administrative guidelines to govern their exercise of discretion?

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The Petitioners, James K. McGovern, J. Michael McGovern, and Augustus Brian Fontaine respectfully pray that a Writ of Certiorari issue to review the Final Judgment of the United States Court of Appeals for the Fifth Circuit, entered in this proceeding on July 15, 1980, affirming the Petitioners' conviction in the United States District Court for the Middle District of Florida.

OPINION BELOW

The Opinion of the Circuit Court of Appeals for the Fifth Circuit is an opinion marked DO NOT PUBLISH. A copy of the Court's Opinion appears in the Appendix Hereto (Pg. A-3).

JURISDICTION

The Judgment of the Court of Appeals for the Fifth Circuit was entered on July 15, 1980. A timely Petition for Rehearing

En Banc was filed. The Court of Appeals entered its Order denying the Petition for Rehearing En Banc on September 12, 1980. This Petition for a Writ of Certiorari is therefore timely filed.

The Jurisdiction of the Court is invoked pursuant to 28 U.S.C., Section 1254(1) and Supreme Court Rule 19(1)(b).

QUESTION PRESENTED

The Question presented by this case is as follows:

Whether the Fourth Amendment permits United States Coast Guard officers-in-the-field to stop, enter and board a moving private pleasure vessel on the high seas without reasonable and articulable suspicion of non-compliance with safety and documentation regulations, and without administrative guidelines to govern their exercise of discretion?

CONSTITUTIONAL PROVISION INVOLVED

The Fourth Amendment to the United States Constitution which provides in pertinent part:

> "The right of the people to be secure in their person, houses, papers, and effects against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

STATEMENT OF THE CASE

The SEA TRUMPF is a forty-five foot sloop-rigged private sailing vessel (Vol. II, page 21).

On May 15, 1978, at approximately 8:30 A.M. the United States Coast Guard Cutter Steadfast was about 50 miles west of Naples, Florida in the Gulf of Mexico engaged in a drug seizure case with another unrelated commercial vessel called the MISS SELENA II (Vol. II, pg. 21).

The Miss Selena II had been boarded just hours earlier and was heavily laden with marijuana. At the time the Sea Trumpf was sighted, the Steadfast had the Miss Selena II in escort and both vessels were dead in the water while Commander Currier of the Steadfast was awaiting instructions from Miami as to what to do with the Miss Selena II (Vol. II, Pg. 57). Even though the Steadfast already had a large shrimping vessel in escort, the Officer-of-the-Deck contacted Commander Currier, notified him of a sailing vessel on the horizon and stated that he would like to proceed to determine its nationality. Commander Currier advised the Officer-of-the-Deck to proceed on a course to determine the name, home port, and nationality of the sailing vessel (Vol. II, Pg. 21). It was determined that the vessel was named the Sea Trumpf out of New York and that it was a 45-foot sloop-rigged private sailing vessel (Vol. II, Pg. 21).

The Sea Trumpf was 50 miles off of land and headed northeasterly under sail when she was boarded (Vol. II, Pg. 61). She was properly rigged and not violating any safety or navigational laws (Vol. II, Pg. 61). She was not overloaded and was of sufficient size to be at the depth of water where she was boarded (Vol. II, Pg. 61). There were no riggings hanging in the water (Vol. II, Pg. 61), and the Sea Trumpf did not appear to be in distress in any way prior to the boarding (Vol. II, Pgs. 108, 109). No contraband was observed on the deck of the Sea Trumpf (Vol. II, Pg. 108), and she appeared to be having no obvious problems. In summary, when considering the appearance, position, course and speed of the Sea Trumpf, there was nothing unusual observed by the Coast Guard Commander (Vol. II, Pg. 60).

Nevertheless, after engaging in conversation with the Sea Trumpf over radio, Commander Currier asked the Sea Trumpf to stand by for a Coast Guard boarding (Vol. II, Pg. 22). Although Commander Currier claims to have ordered a routine, or Phase I, boarding for safety and documentation inspection, he is certain that he contacted the E.P.I.C. Center in El Paso, Texas, to determine whether there was any record of the Sea Trumpf in the *criminal* intelligence center there prior to order-

ing the boarding of the Sea Trumpf (Vol. II, Pg. 79). Further, at this time, Commander Currier had in his pocket a suspect vessel list, which he checked for the name of the Sea Trumpf (Vol. II, Pg. 34).

The Commander had no administrative or official guidelines, written or otherwise, to follow in deciding what vessels to board and how to conduct the inspection. His own personal guidelines were rather vague, see generally (Vol. II, Pgs. 48a, 48b, 49, 60, 86). The Commander attempted to articulate his own personal criteria as follows: He does not board a vessel which is actively fishing in trade or when the vessel has its nets down. He does not harrass the individual who is engaged in a legitimate business. If he sees a pleasure vessel with 15-18 people on board, in other words if its overcrowded, he will board it for obvious safety purposes. If he sees smaller vessels from 25 to 35 feet, he will board them to determine if there is any type of communications aboard and to determine the type of safety jackets available (Vol. II, Pgs. 48a-48b).

With regards to a sailing vessel the size of the Sea Trumpf, he tries to determine whether it is a United States or foreign vessel and to determine if it's engaged in a yacht race. He keeps a routine list which says which vessels are engaged in a yacht race in which instance he does not board or interfere (Vol. II, Pg. 60). He also gives consideration to the position, course and speed of a vessel. However, with regards to the Sea Trumpf, he found nothing unusual about the course or speed (Vol. II, Pg. 60). He would not board a vessel if he was engaged in a mission with a ship in tow, even if he sighted 35 vessels (Vol. II, Pg. 53). Remember, however, that the Steadfast was involved in escorting the Miss Selena II at the time the decision was made to board the Sea Trumpf.

Finally, Commander Currier testified frankly that it was his intention to board any vessel which he sighted within the extent of endurance and capability of his crew (Vol. II, Pg. 69).

The Commander gave the order to stop, board and enter the Sea Trumpf. The Boarding Party which boarded the Sea Trumpf consisted of Lt. Kelly, First Class Petty Officers Wiley and Russem (Vol. II, Pg. 23). All three Boarding Officers were armed with 45 caliber pistols (Vol. II, Pg. 102).

It is important to review closely the actions of the Boarding Party when they set foot on board the Sea Trumpf. At the outset, one of the members of the Crew of the Sea Trumpf asked what right the Coast Guard had to board their vessel (Vol. II, Pg. 90).

Lt. Kelly informed that he was boarding pursuant to the authority of 14 U.S.C. 89. Then, instead of beginning the purported safety and documentation inspection, Lt. Kelly conducted the following interrogation clearly indicating he was entering and boarding to conduct a criminal investigation aimed at determining whether or not there was marijuana aboard the Sea Trumpf, not for a "safety inspection." First, he asked if the three persons on deck were the only three people on board (Vol. II, Pgs. 90-91). Second, he asked if there were any weapons on board (Vol. II, Pg. 91). Third, he then required the crew of the Sea Trumpf to provide some form of personal identification (Vol. II, Pg. 91). Finally, he asked the master for the documentation papers of the vessel (Vol. II, Pg. 91). The record is clear that the Sea Trumpf contained proper documentation (Vol. II, Pg. 115).

It was while Officer Wiley was on the forward part of the sailboat checking not for safety features but for the personal identification of one of the *crew members* of the sailboat that he noticed bales wrapped in green plastic bags (Vol. II, Pg. 91). These bales were all stored completely below deck in the private quarters of the craft.

Although the Sea Trumpf contained proper documentation, no safety inspection was ever conducted because Lt. Kelly apparently noticed the bales in the cabin and terminated any semblance of a safety inspection at that point (Vol. II, Pg. 116).

A form 4100 is normally used for a safety and documentation inspection, but Officer Wiley did not know if such a form was filled out by Lt. Kelly (Vol. II, Pg. 116) and this document was also not available for the Suppression Hearing.

The normal procedure during a safety and documentation inspection is to take along a narcotics test kit, however, since the kit had recently been used in the boarding of the Miss Selena II, it was inadvertently not taken when the Sea Trumpf was boarded (Vol. II, Pg. 108).

On the day of this routine documentation and safety inspection boarding, the Steadfast was armed with a 3-inch gun forward and a 50-caliber machine gun on the bridge (Vol. II, Pg. 64). On board, as an advisor, was a United States Customs Agent (Vol. II, Pg. 62).

The Steadfast had left St. Petersburg on Sunday, the 14th of May on this particular mission with orders to conduct routine law enforcement patrols. Routine law enforcement patrols were defined by Commander Currier as patrolling a designated area specified by his Commander to conduct safety inspections, documentation inspections, pollution patrols and if required, to conduct search and rescue missions (Vol. II, Pgs. 35-36).

The Commander conspicuously failed to mention as orders and purpose for this mission patrolling for possible smuggling.

The Trial Court, however, found from the record that it was clear the Coast Guard Officials were alert to the fact that there might be marijuana in vessels offshore. Further, the Trial Court found there seemed to be some concerted effort towards intercepting the vessels, as was exemplified by the suspect vessel list and the centralizing of authority in El Paso, Texas to notify the Coast Guard to coming and going of vessels suspected of containing marijuana (Vol. VI, Pgs. 13-14).

In this regard, Commander Currier testified that whenever the Steadfast was involved in a marijuana bust, a decal consist-

ing of a large marijuana leaf in a loop with a slash underneath was painted on the bow of the Steadfast. This was done as sort of service stripe or moral factor. The Commander testified the stripe served as a recognition factor or E for efficiency (Vol. II, Pgs. 65-66).

Based on the foregoing, the Trial Court denied the Motion to Suppress. It is this denial of the Motion to Suppress that was the subject of the appeal to the Fifth Circuit Court of Appeals.

On June 14th, 1978, the Federal Grand Jury in Tampa, Florida, returned a Superseding One Count Indictment against all of the Petitioners (Vol. I, Pg. 1), charging the Petitioners with Conspiracy to Import and Possess with Intent to Distribute approximately 9,000 pounds of marijuana, a Schedule I controlled substance, in violation of Title 21, U.S.C. Sections 960 and 952, and Title 21, U.S.C. Section 841.

Prior to the Commencement of the Trial, the Petitioners filed Motions to Suppress Evidence (Vol. I, Pgs. 4, 16, 27). The Motions to suppress evidence were denied by the Trial Judge. The Petitioners were subsequently convicted at a jury trial and the Trial Court thereafter sentenced them to terms of imprisonment of two years followed by special parole terms.

REASONS FOR GRANTING THE WRIT

The Decision of the Fifth Circuit Court of Appeals creates in the United States Coast Guard a special class of law enforcement agents in this country because the decision vests in a Coast Guard officer-in-the-field unfettered discretion to stop, enter and board an American pleasure vessel on the high seas without any reasonable and articulable suspicion of non-compliance, and without any administrative guidelines to control his action.

Existing Fourth Amendment jurisprudence, as exhibited by six decades of developing Supreme Court holdings carries one central over-riding focus and theme, that is; Whenever possible, the decision to make an administrative seizure or search should not be left in the unbridled discretion of officers-in-the-field.

The present state of the law in the Fifth Circuit Court of Appeals as evidenced by this case, and the leading cases of *United States* vs. *Williams*, 617 F.2d 1063 (5th Cir. 1980) (en banc) and *United States* vs. *Warren*, 578 F.2d 1058 (5th Cir. 1978) (en banc) is contrary to this basic constitution principle.

As a result, presently a United States Coast Guard Commander has unfettered discretion to stop, enter and board any American vessel, be it a private pleasure craft or a commercial ship, on the high seas. He can do this totally at random and without any objective, reasonable, or articulable standard, administrative or otherwise, to govern his governmental conduct.

At the heart of the Government's claim that reposing this sort of power in a Coast Guard officer-in-the-field meets constitutional muster is the assertion that the Coast Guard has this authority, pursuant to Title 14, U.S.C., Section 89(a), in order to enable them to conduct safety and documentation checks, purely administrative action.

However, this Court has previously, and recently, refused to allow other statutory, yet warrantless and random inspec-

tions for *safety* purposes, whether these governmental inspections were directed at residential premises, *Camara* vs. *Municipal Court*, 387 U.S. 523, 87 S.Ct. 1727, 18 L.Ed.2d 930 (1967) or at business premises, *Marshall* vs. *Barlow's, Inc.*, 436 U.S. 307, 98 S.Ct. 1816, 56 L.Ed.2d 305 (1978) or at automobiles, *Delaware* vs. *Prouse*, 440 U.S. 684, 99 S.Ct. 1391, 59 L.Ed.2d 660 (1979). Warrantless *documentation* inspections have been declined by this Court whether the purpose of the inspection was to establish citizenship, *United States* vs. *Brignoni-Ponce*, 422 U.S. 873, 95 S.Ct. 2574, 45 L.Ed.2d 607 (1975), or the existence of a proper driver's license and vehicle registration, *Delaware* vs. *Prouse*, *supra*.

In each of these cases this Court fashioned a proper, practical constitutional solution after balancing the privacy rights of the individual with the interests of government in effective law enforcement.

The majority view in *Warren* holds that a boarding and inspection "need not be founded on any particularized suspicion." However, *Warren* does not deal with this proposition on more than conclusory terms. No effort is made to develop in a systematic fashion a line of analysis which explains how such a result can be squared with present Supreme Court decisions in similar circumstances. See generally *U. S.* vs. *Williams*, 617 F.2d 1063, 1093, (5th Cir. 1980) (Rubin, J., concurring); *U. S.* vs. *Warren*, 578 F.2d 1058, 1079 (5th Cir., 1978) (Faye, J., dissenting); 3 W. LaFave, *Search and Seizure*, §10-8 (f) (Supp. 1980).

The Fifth Circuit Court of Appeals acknowledges that their precedent in this area has been discordant, muddled and erratic, resulting in uncertainties in those burdened with enforcing on the seas the laws of the United States. See *Williams*, *supra*.

Warren and *Williams*, the landmark decisions of the Fifth Circuit in this area, exhibit sharp areas of disagreement in philosophy and approach between the majority and the dissenting or concurring opinions. The en banc court in *Warren* is

divided eight to six. In *Williams*, twelve judges form the majority, while a total of eleven concur only in the result.

Furthermore, the two cases have fashioned rules so lacking in constitutional depth that the current state of the law offers more privacy protection to individuals on foreign vessels, than those aboard American crafts. As a result, the Constitution of the United States requires more to interfere with a person's liberty where a foreign vessel, not an American pleasure craft, is in the sights on a Coast Guard radar screen.

Additionally, in *United States* vs. *Piner*, 608 F.2d 358 (9th Cir. 1979), the Ninth Circuit has reached a different result than the Fifth, applying the analysis utilized in *Delaware* vs. *Prouse* and holding that the Fourth Amendment imposing a standard of reasonableness upon the exercise of discretion by government officials. *Piner* concludes that a Coast Guard random safety and registration stop and boarding must be for cause, requiring at least a reasonable and articulable suspicion of non-compliance; or that the stop be conducted under administrative standards so drafted that the decision to search is not left to the sole discretion of the Coast Guard officer.

Finally, Florida law has also adopted the approach mandate by *Delaware* vs. *Prouse* in delineating and restricting the authority of statutorially authorized document inspections by Florida Marine Patrol officers, requiring reasonable suspicion before permitting a stop and boarding. *Casal* vs. *State*, 375 So.2d 1077, (3rd D.C.A., 1979).

This case, involving a private pleasure craft navigating the open waters with absolutely no discernible safety problem, presents a classic opportunity for this Court to settle the constitutional quagmire that presently exists.

The controlling facts here are not in dispute. As recognized in the Opinion below, the Sea Trumpf was boarded because the officers on the Steadfast believed that pursuant to Section 89(a) they had the authority, without any cause, to make a warrant-

less stop and entry of a pleasure craft on the high seas for a safety and document check. The boarding was without probable cause or reasonable suspicion. The Coast Guard Commander stated unequivocally that it was his personal policy to board whatever vessels he saw within the capability of his crew and vessel.

The Sea Trumpf was properly rigged, with no riggings hanging in the water and not in violation of any safety or navigational laws. She was under sail, fifty miles off of land, was not overloaded and of sufficient size to be in the depth of water where she was boarded. She was not in distress and appeared to be having no obvious problems. Her appearance, position, course and speed indicated nothing unusual to the Commander of the Steadfast. Finally, there was no contraband observed on her deck and a check of the suspect vessel list and with the Intelligence Center in El Paso indicated that she was not suspected of being involved in any illegal activity.

Furthermore, the crew of the Sea Trumpf did not consent to the boarding and in fact, asked the Boarding Party what right the Coast Guard had to board their vessel.

Once on board, the actions of the Boarding Party, and especially those of Lieutenant Kelly, indicate clearly that the intrusion went farther than a routine safety and documentation inspection. Again, Lieutenant Kelly began an inquiry of the crew of the Sea Trumpf, asking if there were any other persons on board, if there were any weapons on board, and finally requiring the crew to provide identification.

Without question, the detention and boarding of the Sea Trumpf by the Coast Guard constituted an intrusion sufficient to invoke Fourth Amendment principles. See *Terry* vs. *Ohio*, 392 U. S. 1, 16, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968); *United States* vs. *Brignoni-Ponce*, *supra* at 878.

Moreover, searches or seizures are, in the absence of a warrant, presumptively unreasonable under the Fourth Amend-

ment. See *See* vs. *City of Seattle*, 387 U.S. 541, 87 S.Ct. 173, 18 L.Ed.2d 943 (1967). Further, a detention by a government authority is a seizure, *Terry* vs. *Ohio*, *supra* at 60, and the seizure invokes the protection of the reasonableness restraints of the Fourth Amendment.

It follows that any warrantless detention under statutory or regulatory authority must have valid and reasonable constitutional law as its basis, or the acts conducted pursuant to that authority are unconstitutional. It is axiomatic that the existence of statutory authority does not, however, immunize a search under Fourth Amendment scrutiny. See *Almeida-Sanchez* vs. *United States*, 413 U.S. 226, 93 S.Ct. 2535, 35 L.Ed.2d 596 (1973).

There is no contention made here of a warrant, either criminal or administrative; of probable cause to suspect either a criminal, a safety, or a documentation violation; of reasonable suspicion of any wrongdoing or administrative impropriety; of consent by the Petitioners; of a border or customs search under 19 U.S.C., Section 1581. Thus, this case, from the point of view of constitutional analysis, involves an administrative inspection conducted in an allegedly random fashion to ascertain compliance with and to enforce safety regulation.

This Court has previously refused to allow other warrantless random inspections for safety purposes, *Camara* vs. *Municipal Court*, *supra*; *Marshall* vs. *Barlow's, Inc.*, *supra*; *Delaware* vs. *Prouse*, *supra*; *United States* vs. *Brignoni-Ponce*, *supra*.

Of these decisions, *Marshall* vs. *Barlow's, Inc.* and *Delaware* vs. *Prouse* are the most relevant to a solution of the constitutional problem presented by the boarding of the Sea Trumpf.

Before discussing *Marshall* and *Prouse* however, it is important to realize that established Fourth Amendment doc-

trine and analysis can, and has been, reasonably and practically applied to offshore waters. See *Williams, supra,* (Rubin, J., concurring); *Piner, supra;* and *LaFave, supra.* Indeed, in *United States* vs. *Lee,* 274 U.S. 559, 563, 47 S.Ct. 746, 748, 71 L.Ed. 1202 (1927) this Court, in another era, derived rules permitting an American vessel on the high seas to be seized by the Coast Guard from rules that permit a vehicle on land to be seized by prohibition officers. Certainly, the geographical circumstances in the instant case requires a re-thinking and fresh application of Fourth Amendment principles, but "the Constitution is not to be interpreted like the signals for Paul Revere's Ride: " 'One, if by land, and two, if by sea.' " See *Williams, supra,* (Rubin, J., concurring).

In *Marshall* this Court said:

> The Warrant Clause of the Fourth Amendment protects commercial buildings as well as private homes. To hold otherwise would belie the origin of that Amendment, and the American colonial experience. An important forerunner of the first 10 Amendments to the United States Constitution, the Virginia Bill of Rights, specifically opposed 'general warrants, whereby an officer or messenger may be commanded to search suspected places without evidence of a fact committed.' The general warrant was a recurring point of contention in the colonies immediately preceding the Revolution. The particular offensiveness it engendered was acutely felt by the merchants and businessmen whose premises and products were inspected for compliance with the several Parliamentary revenue measures that most irritated the colonists. "(T)he Fourth Amendment's commands grew in large measure out of the colonists' experience with the writs of assistance. . . (that) *granted sweeping power to customs officials and other agents of the King to search at large for smuggled goods". . . . Against this background, it is untenable that the ban on warrantless searches was not intended to shield places of business as well as of residence.* 56 L.Ed.2d at 310-311 (Cites omitted) (Emphasis supplied).

Historically, the use of general writs of assistance in customs searches aimed at vessels as well as warehouses has been portrayed as a factor contributing to the American Revolution.

See generally, N. Larson, *History and Development of the Fourth Amendment*, 54 N.17, 67 N.57, 71-72 (1937). Therefore the historical rational of *Marshall* would certainly apply and require that the Fourth Amendment offer its protection not only to homes and commercial buildings, but to private pleasure vessels like the Sea Trumpf as well.

That the boarding here was ostensibly for administrative purposes and allegedly not to investigate violations of the criminal law does not matter. As stated in *Marshall:*

> If the government intrudes on a person's property, the privacy interest suffers whether the government's motivation is to investigate violations of criminal law or breaches of other statutory or regulatory standards. It therefore appears that *unless some recognized exception to the warrant requirement applies, See* Vs. *City of Seattle, supra, would require a warrant to conduct the inspection sought in this case.* 56 L.Ed.2d at 311. (Emphasis supplied).

In the instant case, Commander Currier, Lieutenant Kelly and the other Coast Guardsmen believed that they had authority to make warrantless searches pursuant to Section 89(a). Therefore, they had unbridled discretion as to when, whom, and how to search. This is evidenced by Commander Currier's lack of definitive or administrative criteria as to what vessels to board. That the stop was at the will and pleasure of the officer-in-the-field is graphically shown by the commander's policy of boarding whatever vessels he saw within the capability of his vessel and crew.

The government personnel conducting the inspection herein acted free of any restraint upon their discretion. This conduct was specifically condemned in *Marshall* when the Court said:

> The authority to make warrantless (administrative) searches devolves almost unbridled discretion upon executive and administrative officers, particularly those in the field, as to when to search and whom to search . . . . . 56 L.Ed.2d at 317-318.

It was this type of unbridled discretion that required the Supreme Court to strike down warrantless intrusions on private property to investigate compliance with statutory safety regulations. In sum, *Marshall* dictates that the boarding of the Sea Trumpf was constitutionally impermissible whether done for a civil safety and documentation inspection or as a part of a criminal law enforcement mission.

Delaware vs. *Prouse*, a natural decendent of prior decisions of the Court, "casts a heavy cloud" over the decisions of the Fifth Circuit which hold that Coast Guard inspections may be conducted purely at random. See, *LaFave, supra* at 39.

Prouse adopts the time-honored approach, and weighs the permissibility of a particular law enforcement practice by balancing the intrusion on the individual's Fourth Amendment interest against the promotion of legitimate governmental interests.

By using such an approach, *Prouse* begins at the standard constitution starting place; that is, the reasonableness standard requires at a minimum, that the facts upon which an intrusion is based be capable of measurement against some objective standard, whether that standard be probable cause, or in other factual circumstances, a less stringent test. Logically, *Prouse* reasons, some situations, after a balancing of the interests, preclude insistence upon some quantum of individualized suspicion. However, in these very limited factual settings, *Prouse* holds that other safeguards are relied upon to assure that the individuals reasonable expectation of privacy is not subject to the discretion of the official in the field. The safeguards, of course, vary slightly depending upon the practicalities of the situation.

The decision in the instant case, and the prior decisions of the Fifth Circuit, offer no such safeguards, therefore are constitutionally unsound.

Prouse weighs the opposing interests by utilizing the following circumstances. Clearly, the majority view in the Fifth Circuit majority does not consider the following dialogue as relevant to the high seas, at least with regards to privacy interests aboard American vessels. However, Professor LaFave, the Ninth Circuit in *Piner*, and the minority view in the Fifth Circuit agreed that this Court can follow the natural progression of Fourth Amendment logic and examine the privacy rights of persons at sea in the last quarter of the Twentieth Century according to the same standards and utilizing the same approach used to balance these rights against the competing interest of the public in effective law enforcement.

Following are the relevant considerations, according to this Court, as most recently seen in *Prouse*.

1. The magnitude of the government interest in effective law enforcement dealing with ship safety and documentation.

Certainly this interest is compelling, but *Prouse*, after admitting the vitality of the State's interest in highway safety and regulation, nevertheless held that such a vital interest was not enough to allow random stops and inspections. All things considered, the Coast Guard's and the public's interest in safety and documentation at sea is certainly no more substantial than on land so as to allow for random stops and boarding on the sea. Certainly, there is substantially more death, injury and destruction upon the nation's highways, than there is upon the sea.

It is recalled that the stop and boarding here is not supposed to be for purpose of stopping drug importation, but for a routine safety inspection.

Nevertheless, assuming for argument that stopping smuggling was the purpose, even this public interest would not alone be sufficient to render the constitution meaningless at sea. Moreover, a similar government interest has already been re-

jected by this Court in a border situation. See *Brignoni-Ponce, supra.*

Additionally, requiring Coast Guard officers to have reasonable and articulable evidence before stopping and boarding a pleasure vessel for the purpose of investigating for a criminal violation does not mean that the Coast Guard will find it impossible or impractical to effectively enforce the law at sea. As in the investigation of any other crime, the Coast Guard must be bound by constitutional restrictions. Smugglers, like other law violators, leave tracks, and the Federal Government has the wherewithal to follow the tracks using traditional methods of law enforcement. A perfect example is the factual setting of *Williams, supra,* where the vessel in question was initially sighted 1-½ miles off the Columbia coast on January 25, 1978, by a D.E.A. pilot flying a mission there to spot vessels that might be involved in drug trafficing. The circumstances being suspicious, he identified the vessel and reported his observations to the El Paso Intelligence Center of the D.E.A. in Texas. Then, 5 days later, off the top of the Yucatan Peninsula, the vessel was sighted again by a Coast Guard Cutter. The vessel by now was on a suspect vessel list, so the Coast Guard Commander also contacted El Paso Intelligence. The vessel was then surveilled by the cutter until February 2, 1978 when she was boarded. In the meantime, observations by the Coast Guard officers, communications with authorities on shore and international diplomatic messages gave cause for the boarding, thus demonstrating that effective, non-discretionary law enforcement is possible even on the sea in this age of advanced technology and communications.

So, on this gauge along, the magnitude of the government interest is not sufficient to permit discretionary boarding.

Even international law considerations should not be permitted to override Fourth Amendment protections, for to do so would certainly diminish the power and dignity of the United States Constitution.

2. The extent of which acceptable results are attainable only by using a system of random stops.

Prouse, determined that the usefulness of random stops as an effective law enforcement tool in terms of discovering violators to be slight. Unlicensed persons and unregistered vehicles could be found by using the standard, and less intrusive, techniques of investigation of traffic accidents or of requiring registration decals on cars.

There is absolutely no constitutional reason why boat operators could not be required to be licensed, thus permitting regulations and control of boat drivers for safety purposes. Periodic boat inspections with required decals would certainly go farther in promoting boat safety than random inspections, with a corresponding decrease in intrusion to personal privacy. Spot checkpoints are feasible with regards to boats, and in fact, are utilized now in inland channels and waterways by the Coast Guard and local marine patrols. Such a standardized checkpoint is also less intrusive since expected and anticipated by a full class of boaters, and not isolated to a single craft at sea.

Consequently there are other, less offensive, ways of promoting boat safety and documentation than random stops.

3. The extent of the intrusion or invasion of privacy involved.

The Sea Hath no King but God Alone.

.....D. G. Rosetti
THE WHITE SHIP

This much is certain: that he that commands the Sea is at great liberty, and may take as much and as little of war as he will.

.....Bacon, Essays:
OF KINGDOMS AND ESTATES

That the persons of our citizens shall be safe in freely traversing the ocean, that the transportation of our own produce, in our own vessels, to the markets of our own

> choice, and the return to us of the articles we want for our own use, shall be unmolested, I hold to be fundamental, and the gauntlet that must be forever hurled at him who questions it.
>
> .....Thomas Jefferson
> WRITINGS Vol. xiv p. 301

> "The ship is the sailor's home. There is hardly the expectation of privacy even in the curtained limousine or the stereo-equipped van than every mariner or yachtsman expects aboard his vessel."
>
> .....*U. S.* v. *Cadena*,
> 588 F.2d 100
> (5th Cir. 1979)

The privacy interest against which the governments interest here must be balanced sits at the foundation of all of the individual freedoms warranted by the Bill of Rights. In its purest sense, the right of privacy, as protected by the Fourth Amendment, means the right to be free from governmental interruption, intrusion, or intervention of any sort, unless the government action is sanctioned by a court.

Moreover, the right of privacy encompasses the expectation of that right, so that an individual can live and move about free from even the threat of unwarranted and random government hinderance and meddling. The Revolution was fueled by discretionary, haphazard, pot-luck intrusions that grew in strength through abuse and eventually became repression. The right of privacy is the essential right to be free of even the possibility that the Government, through the Federal Bureau of Investigation, the Central Intelligence Agency, the Internal Revenue Service, the Drug Enforcement Administration, Customs, or even the United States Coast Guard, can, at the violation and fancy of the officer-in-the-field, interfere into our daily lives.

The right of privacy involves freedom of movement and travel, freedom of thought, freedom to decide where you want to be, day or night, rain or shine. The right of privacy involves security, serenity, tranquility and peace of mind.

The right of privacy is a treasured, valued right, guaranteed by few constitutions in the world today and protected jealously only by our judicial system and few others.

Fourth Amendment jurisprudence in the United States today has restricted in some reasonable, practical fashion the free choice and disposition of a government officer-in-the-field before he interferes with an individual at his home, on a walk or a jog, at work, when riding in a car, when using a public phone booth, and even when just visiting in a place where privacy is expected.

The right of privacy is so well respected by our constitution that the Fourth Amendment protects people, not places, *Katz* vs. *United States*, 389 U.S. 347, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967).

Certainly, the right to privacy and the expectation of privacy do not diminish when an individual leaves the land and goes to sea, even to the high seas. To the contrary, the expectation of privacy is at least as great as in a car, see also *U.S.* vs. *Conroy*, 589 F.2d 1258 (5th Cir. 1979).

Moreover, those who venture onto the seas are demonstrating by their assertive conduct that they are willing to sacrifice the time, energy, and money necessary to retreat to the seclusion and sanctum of the sea. This truth is even more persuasive when applied to those individuals who choose to travel the waters in a pleasure sailing craft. Traditionally, those who sailed the seas are thought of as persons who demonstrate to all that they are independent, private people, desirous of keeping their distance and their privacy.

Certainly, those who travel the sea have a more substantial privacy interest than those who travel on the land. See *Williams*, *supra*, (Rubin, J., concurring); *LaFave*, *supra*.

The greater the expectation of privacy, the greater the intrusion when this right is impeded. *Prouse*, after applying the

balancing test held that the intrusion of arbitrarily stopping cars was too great to allow a stop without an articulable factual reason or some administrative guidelines. By analogy then, the stopping of a vessel, especially a sailing vessel, on the high seas is overall more inconvenient than the stopping of a car on a highway. A boat stopping consumes more time, creates more anxiety and fright in an isolated atmosphere, is a greater interference with freedom of movement, creates greater danger of injury and lastly, is a greater show of authority by government than the stopping of a car. In sum, the physical and psychological intrusions which accompany a random stop of a boat for a safety and documentation inspection are more significant and threatening than those observed in *Prouse*.

4. The degree to which a grave danger of abuse of discretion exists.

The Coast Guard has broad responsibilities both historically and by statute. They even functioned as a quasi-military or naval force, roaming all over the globe to protect, in one way or another, the interests of the government. These duties have always included the interception of a criminal law breaker. In recent years the Coast Guard has been particularly active, as can be seen from the cases before the courts, in the seizing of vessels laden with contraband.

Here, the Steadfast followed the custom of awarding decals of a large marijuana leaf with a slash underneath following successful drug busts. This practice of building moral or recognition is similar to that used by fighter pilots to recognize enemy planes downed on war missions. Such a practice of recognizing excellence is not to be condemned, but it does reflect the true nature of the activities of the Coast Guard on the mission in question here. Additionally, a close examination of the events here verifies that, the darker side of human nature being what it is, unbridled discretion in the hands of a Coast Guard Commander, presents as grave a danger of abuse as is presented by a housing inspector or an OSHA Agent.

Commander Currier was very careful not to admit that he and his crew were, in fact, patrolling the Gulf of Mexico in an attempt to catch and intercept smugglers of marijuana. However, the Trial Court found that the Record supported the conclusion that there was some concerted action by the Coast Guard to be involved in the interception of smugglers. Therefore, the facts betray the conclusion that what occurred here was *strictly* a safety and documentation inspection.

First, there was nothing about the appearance of the Sea Trumpf that indicated that she was violating any safety laws or was in distress or having any obvious problems. Second, the Steadfast had another large vessel in escort when it stopped, boarded and searched the Sea Trumpf. Third, the presence of the suspect vessel list and the inquiry with the E.P.I.C. Center in El Paso indicates that Commander Currier was certainly involved in a criminal investigation when he made the decision to board the Sea Trumpf. Fourth, there was a Customs officer aboard the Steadfast during the mission. Fifth, the boarding party was armed and normally took with them a narcotics test kit. Sixth, and most telling, is the inquiry conducted by Lieutenant Kelly when he first boarded the Sea Trumpf.

It is ludicrous to maintain that the boarding which occurred here was for the purpose of checking boat papers and life jackets.

In essence, what occurred was an intrusion by the Coast Guard under the apparent authority of 14 U.S.C., Section 89(a) as a pretext to subvert the reasonableness requirement of the Fourth Amendment. Clearly, the Coast Guard wanted to board the Sea Trumpf in an attempt to determine if there was marijuana aboard. The Coast Guard should not be allowed to obviate the necessity of respecting the Fourth Amendment by literally applying Section 89(a) during a criminal law enforcement mission. All things considered, there is a grave danger that the discretion vested in Coast Guard officers-in-the-field will be abused.

5. The extent to which meaningful, practical limitation upon the power of the officers-in-the-field can be fashioned.

The Petitioners do not suggest that a search warrant, or even probably cause be required before the Coast Guard can stop an American pleasure craft on the high seas for a safety or documentation inspection.

Various alternatives, all workable and all as effective as the system of routine and random checks now in use, present themselves.

As a constitutional minimum if the stops are left to the discretion of the law officer, a quantum of evidence sufficient for the officer to be able to articulate a reasonable suspicion that the vessel is violating some law is a workable constitutional standard. See *Williams, supra,* (Rubin, J., concurring). The facts need not indicate a criminal violation, but can point to a safety or documentation problem.

The Court in *Piner, supra,* after finding that random stopping and searching without cause was not justified by the government need to enforce compliance with safety regulations and constituted a violation of the Fourth Amendment also suggests a reasonable suspicion standard. Specifically, *Piner* held that a stop and boarding after dark must be for cause, requiring a reasonable and articulable suspicion of non-compliance, or must be conducted under administrative standards, so drafted that the decision to search is not left to the sole discretion of the Coast Guard officer. The requirement of administrative rule making is not novel in the Fourth Amendment law, and is also recommended by Professor LaFave.

Professor LaFave also suggests the possibility of an "area warrant" like the one suggested by Justice Powell in *Almeida-Sanchez* vs. *United States.* The warrant, issued before the cutter leaves port and approved by an impartial magistrate, would set out the circumstances and manner in which the inspection is to be conducted.

The problem is solvable utilizing accepted Fourth Amendment approaches, even within the geographical uniqueness presented by the sea. Practical, operable solutions which provide constitutional protection exist. It is only that the majority view of the Fifth Circuit has not applied these approaches or achieved constitutional results.

"The Court that decided *Carroll* vs. *United States*, 267 U.S. 132, 45 S.Ct. 280, 69 L.Ed. 543 (1925), involving the stop and search of an automobile, sat during a period in our history when the Nation was confronted with a law enforcement problem of no small magnitude—the enforcement of the prohibition laws. But that Court resisted the pressure of official expedience against the guarantee of the Fourth Amendment." *Almeida-Sanchez* vs. *United States, supra*, at 274. "The needs of law enforcement stand in constant tension with the Constitution's protections of the individual against certain exercises of official power. It is precisely the predictability of these pressures that counsels a resolute loyalty to constitutional safeguards." Id. at 273.

Because of the Fourth Amendment, a government agent can not interfere with an individual's privacy and security without some reasonable, articulable reason or some substantial guideline, whether that individual is in his house, on the street, in a car, or at his work or business.

This standard of reasonableness on the exercise of unfettered discretion is at the core of all Fourth Amendment freedoms. The central issue here is whether an individual aboard an American pleasure vessel at sea looses this fundamental protection. Also at issue is whether Coast Guard Commanders should be given unlimited, unbridled discretion to stop individuals on pleasure boats whenever, wherever, however he pleases without reason and without guidelines.

As observed in *Prouse*, were an individual subject to unfettered governmental intrusion every time he entered an automo-

bile, the Fourth Amendment would be seriously circumscribed. This truth applies with equal vitality to an individual entering a private pleasure boat.

The problem is perplexing and lingering. The Coast Guard is stopping vessels pursuant to § 89(a) all along the Atlantic Seaboard, as far north as Maine, in the Gulf of Mexico and along the West Coast. The Circuits are in conflict. The Constitution is being abused. Guidance from this Court is necessary.

CONCLUSION

The decision below departs radically from both substantive and procedural precedent in that it cannot be reconciled with the decision of this Court in *Camara* vs. *Municipal Court, supra; Marshall* vs. *Barlow's, Inc., supra; Delaware* vs. *Prouse, supra; United States* vs. *Brignoni-Ponce, supra; Almeida-Sanchez* vs. *United States, supra; Carroll* vs. *United States, supra,* and others. Additionally, the decision below is in direct conflict with the decision of the Ninth Circuit in *United States* vs. *Piner, supra.* The matter involved is of extreme general and national significance. The maintenance of uniformity and the administration of criminal justice in the Federal Courts is jeopardized by the decision below. Therefore, for all of the reasons listed above, the Petitioners strenuously urge this Court to exercise its discretion and grant the Writ.

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Attorneys for Petitioners

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that all parties required to be served herein have been served and further certify that a copy of the foregoing Petition has been served upon the United States Solicitor General, Department of Justice, Washington, D. C., 20530, and upon the United States Attorney for the Middle District of Florida, 500 Zack Street, 4th Floor, Tampa, Florida, 33602, by United States Mail, Postage Prepaid, on this the 8th day of October, 1980.

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APPENDIX

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 78-5726

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

JAMES K. McGOVERN, JAY MICHAEL McGOVERN, and AUGUSTA BRIAN FONTAINE,
Defendants-Appellants.

Appeals from the United States District Court for the Middle District of Florida

(JULY 15, 1980)

Before GODBOLD, GEE, and RUBIN, Circuit Judges.

PER CURIAM:

A boarding party from the Coast Guard cutter STEADFAST stopped the appellants' vessel on the high seas for a safety and document check. The boarding was routine, and neither probable cause nor reasonable suspicion precipitated it. The boarding party smelled marijuana and observed many bales of it in plain view. The boarding and discovery were valid. United States v. Williams, _____F.2d_____ [No. 78-5413, slip op. at 6105 (5th Cir. 1978)] (en banc); United States v. Warren, 578 F.2d 1058 (5th Cir. 1978).

Appellants also object to an innocuous comment of the prosecutor made in closing argument. Their complaint is meritless.[1]

AFFIRMED.

1 Judge Rubin agrees that this opinion reflects the views of the circuit since the rendition of the opinion in United States v. Williams, _____ F.2d_____[No. 78-5413, slip op. at 6105 (5th Cir. 1978)] (en banc). However, he still adheres to the views expressed in his concurring opinion in that case, pursuant to which a different result would be reached here.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 78-5726

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

JAMES K. McGOVERN, JAY MICHAEL McGOVERN, and
AUGUSTA BRIAN FONTAINE,
Defendants-Appellants.

**Appeal from the United States District Court
for the Middle District of Florida**

ON PETITION FOR REHEARING AND PETITION
FOR REHEARING EN BANC

(Opinion July 15, 1980, 5 Cir., 198__, _____F.2d_____).

(September 12, 1980)

Before GODBOLD, GEE and RUBIN, Circuit Judges.

PER CURIAM:

( ) The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, (Rule 35 Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 16) the Petition for Rehearing En Banc is DENIED.

( ) The Petition for Rehearing is DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it, (Rule 35 Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 16) the Petition for Rehearing En Banc is also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor of it, rehearing en banc is DENIED.

ENTERED FOR THE COURT:

_____

United States Circuit Judge

Form 704-2

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

CASE NO. 78-57-Cr.T.K.

UNITED STATES OF AMERICA

v.

JAMES KEVIN McGOVERN,
JAY MICHAEL McGOVERN,
AUGUSTUS BRIAN FONTAINE

The Grand Jury charges:

COUNT ONE

From a date unknown to the Grand Jury, up to and including on or about the 15th day of May, 1978, on the high seas at a location approximately 50 miles off the coast of Ft. Myers, Florida, the Middle District of Florida being the place within the United States that James Kevin McGovern, Jay Michael McGovern and Augustus Brian Fontaine were first brought,

JAMES KEVIN McGOVERN,
JAY MICHAEL McGOVERN,
and
AUGUSTUS BRIAN FONTAINE

did unlawfully, willfully, and knowingly combine, conspire, confederate, agree together and with diverse other persons to the Grand Jury unknown, to commit the following offense:

(1) To knowingly and intentionally import approximately 9,000 pounds of marijuana, a Schedule I Controlled Substance, into the United States from a place outside thereof; all in violation of Title 21, United States Code, Sections 960(a)(1) and 952(a).

(2) To knowingly and intentionally possess with intent to distribute approximately 9,000 pounds of marijuana, a Schedule I Controlled Substance; all in violation of Title 21, United States Code, Sections 841(a)(1) and 841(b)(1)(B).

The Grand Jury further presents that during the existence of said conspiracy, one or more of said defendants, at the time and places hereinafter respectively set forth, did the following overt acts to effect the object of said conspiracy:

OVERT ACTS

1. On or about the 15th day of May, 1978, at approximately 8:37 a.m., Charles J. Bennardini, United States Coast Guard, aboard the United States Coast Guard Cutter STEADFAST observed the sailing vessel, SEE TRUMPF, proceeding in a northeasterly direction towards the coast of Florida.

2. On or about the 15th day of May, 1978 at 9:15 a.m., United States Coast Guard personnel boarded the sailing vessel SEE TRUMPF, then located about 50 miles west of Ft. Myers, Florida, and identified aboard the sailing vessel, SEE TRUMPF, the captain, JAMES KEVIN McGOVERN, and crewmen, JAY MICHAEL McGOVERN and AUGUSTUS BRIAN FONTAINE.

3. On or about the 15th day of May, 1978, JAMES KEVIN McGOVERN, JAY MICHAEL McGOVERN and AUGUSTUS BRIAN FONTAINE did possess about 9,000 pounds of marijuana on board the sailing vessel SEE TRUMPF; all in violation of Title 21, United States Code, Sections 963 and 846.

A TRUE BILL

_____

Foreman

JOHN L. BRIGGS
United States Attorney

By: _____
GARY J. TAKACS
Assistant United States Attorney